IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, AND SUCCESSOR TO EDWARD WEAVER, FORMER DIRECTOR OF PUBLIC AID,

Petitioner,

vs.

JOHN JORDAN, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the District Court is unreported and has been included as part of the Appendix in Respondents' brief in opposition to certiorari. The opinion of the Court of Appeals for the Seventh Circuit is reported at 472 F. 2d 985 (7th Cir. 1973) and also is printed as part of the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 18, 1973. No petition for rehearing was filed. This Court's jurisdiction was invoked under 28 U.S.C. Section 1254(1). The Petition for Writ of Certiorari was granted on June 11, 1973.

CONSTITUTIONAL PROVISIONS

Eleventh Amendment to the United States Constitution.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects or another foreign State."

STATUTORY PROVISIONS

Section 604 of the Social Security Act, 42 U.S.C. Section 604, is herein after set out.

> **§604. Operation of State plans—Payments withheld for noncompliance with approved plan**
>
> (a) In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—
>
> (1) that the plan has been so changed as to impose any residence requirement prohibited by section 402(b) [42 USCS § 602(b)], or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or
> (2) that in the administration of the plan there is

a failure to comply substantially with any provision required by section 402(a) [42 USCS § 602(a)] to be included in the plan;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure) until the Secretary is satisfied that such prohibited requirements is no longer so imposed, and that there is no longer any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

(b) No payment to which a State is otherwise entitled under this part [42 USCS §§ 601-610] for any period before September 1, 1962, shall be withheld by reason of any action taken pursuant to a State statute which requires that aid be denied under the State plan approved under this part [42 USCS §§ 601-610] with respect to a child because of the conditions in the home in which the child resides; nor shall any such payment be withheld for any period beginning on or after such date by reason of any action taken pursuant to such a statute if provision is otherwise made pursuant to a State statute for adequate care and assistance with respect to such child.

(Aug. 14, 1935, c. 531, Title IV, Part A, § 404, 49 Stat. 628; Aug. 28, 1950, c. 809, Title III, Part 6, § 361(c), (d), 64 Stat. 558; May 8, 1961, P. L. 87-31, § 4, 75 Stat. 77; July 25, 1962, P. L. 87-543, Title I, Part A, §§ 104(a)(5)(B), 107(b), 76 Stat. 185, 189; Jan. 2, 1968, P. L. 90-248, Title II, Part 3, §§ 240 (b), 241 (b)(4), Part 4, § 245, 81 Stat. 911, 916, 918.)

QUESTIONS PRESENTED

(1) Whether a suit seeking payment of retroactive benefits by a class of welfare recipients is within the clear meaning of the Eleventh Amendment proibiting the extension of the judicial power of the United States to any suit in law or equity commenced or prosecuted. against one of the United States.

(A) Whether there is any express language in the Social Security depriving the States of their immunity under the Eleventh Amendment.

(B) Whether there is any language, express or implied, in the Social Security Act which grants welfare recipients the right to retroactive benefits.

(C) Whether there is any implied consent to waiver of the Eleventh Amendment immunity as a result of Illinois' participation in the federally funded Public Assistance Program.

(2) Whether standards enunciated by the Court for determining the effect to be given a judgment require prospective application of this case and,

(3) Whether federal regulation relied upon by Respondents are inconsistent with the applicable provisions of the Social Security Act, and are therefore invalid.

STATEMENT OF THE CASE

John Jordan, plaintiff-respondent (hereinafter "plaintiff"), filed a Complaint in the United States District Court for the Northern District of Illinois, individually and as representative of a class, seeking injunctive relief and damages for violations of federal welfare regulations against Edward T. Weaver and Harold O. Swank, former Directors of the Illinois Department of Public Aid; David

L. Daniel, Director of the Cook County Department of Public Aid; and Edward J. Barrett, Comptroller of Cook County, defendants-appellants (hereinafter "defendants").

Specifically, plaintiffs alleged that Section 4004, and sub-sections thereunder, of the Illinois Categorical Assistance Manual (set forth in the Record at page 169) were invalid as being inconsistent with thirty-day and sixty-day determination requirements as defined by the United States Department of Health, Education and Welfare ("HEW") in 45 C.F.R., Section 206.10(a). Defendant answered denying the material allegations of the Complaint.

Aid to the Aged, Blind and Disabled ("AABD") is one of the categorical programs administered by the Illinois Department of Public Aid ("IDPA") pursuant to the Illinois Public Aid Code, Ill. Rev. Stat., Ch. 23, Sections 3-1 to 3-12 (1971). The program is funded 50% by the State. The other 50% is provided by the Federal Government under the Social Security Act, 42 U.S.C., Sections 303-306; 1201-1206; 1351-1355; 1381-1385 (1971). The IDPA issued regulations pursuant to Ill. Rev. Stat. Ch. 23, Sections 12-13 (1971), and HEW, which administers AABD for the Federal Government, promulgated regulations pursuant to 42 U.S.C., Section 1302 (1971). Plaintiffs contended that the IDPA was required to process all applications for welfare assistance for the aged, blind and disabled within thirty days of the initial application. Having failed to process such applications within the specified time, so plaintiffs contended, the plaintiff class was entitled to monetary award, commencing on July 1, 1968, to be computed by the amount of money the members of the class would have received had the applications been processed within 30 days. Plaintiff also sought punitive dam-

ages in the amount of $100,000 against defendant Harold O. Swank. In subsequent Amended Complaints filed in the U.S. District Court, plaintiffs alleged that applications for benefits to the disabled had to be processed within 60 days under HEW regulations.

Defendants never claimed that all such applications were processed within 30 or 60 days. Indeed, defendants pointed out that some applications take longer to process than others because of the various factors which must be determined in order to establish the eligibility of particular applicants.

The District Court granted summary judgment for plaintiffs and issued a Memorandum Opinion and Order on February 4, 1972. On March 15, 1972, the District Court entered a Judgment Order which provided, *inter alia*, that:

> 1.) The IDPA and the individual defendants be permanently enjoined from failing to make determinations of eligibility within 30 days of initial application for aid to the aged and blind under the Illinois AABD program, and within 60 days from the date of application as to applicants for aid to the disabled under the AABD program;
>
> 2.) Aid for those found eligible be initiated not later than the final date for eligibility determination;
>
> 3.) 45 C.F.R., Section 206.10(a), be strictly complied with and any inconsistent provisions in the Illinois Categorical Assistance Manual (namely, Section 4004) be declared invalid insofar as inconsistent with that regulation.

The Court also found for the plaintiff on the monetary award question. It required defendants to make all payments not made to all applicants who had applied to the

IDPA for AABD benefits between July 1, 1968 and April 16, 1972, and were subsequently determined eligible by the IDPA, as follows:

(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement became effective.

(b) (i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not mailed within forty-five days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective.

The Court required these AABD benefits to be mailed the defendant to those persons currently receiving AABD within eight months with an explanatory letter, approved by Plaintiffs' attorney.

For those persons not presently receiving AABD from the IDPA, the Court required this action:

(a) A certified letter (return receipt requested), approved by plaintiffs' attorney, must be sent to the last known address of any person who is eligible under the program for damage payments set out above, informing him that he is entitled to a specified amount of AABD benefits wrongfully withheld. That person may claim the amount, computed under the damage formula, by contacting the appropriate County Department of Public Aid within 45 days from the receipt of said letter.

(b) If the appropriate County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. The Court also declared that persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision. (Record 339.)

An appeal then followed to the Court of Appeals. It was based on substantially the same grounds as are raised in this petition for writ of certiorari; in particular, it was pointed out that an action for a monetary award filed against state officials in their official capacity, the award to be discharged out of the Illinois General Revenue Fund, could not be maintained in the Federal District Court in view of the provisions of the Eleventh Amendment to the United States Constitution. The Seventh Circuit Court of Appeals rejected that contention, and found that a retroactive monetary award given to welfare recipients did not contravene the prohibitions of the Eleventh Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

Suit seeking payment of retroactive benefits by a class of welfare recipients is within the prohibition of the Eleventh Amendment precluding the extension of the judicial power of the United States to any suit in law or equity commenced or prosecuted against one of the United States. Affirmative relief in the form of payment of money from the fisc of the State goes beyond the parameters of the *Ex Parte Young* fiction and hence contravenes the Eleventh Amendment.

There is nothing in the language of the Social Security Act which expressly requires a state to waive its immunity as a condition of participation in the Federal Assisted Public Welfare Program. There is also an absence of any statutory language giving welfare recipients an express or implied right to retroactive assistance. Nor is there anything in the legislative history of the Social Security Act manifesting an implied right to retroactive assistance. Quite to the contrary there is clear and convincing legislative history indicating that Congress only intended that a recipient's present need be funded, abrogating any inference of an implied right.

ARGUMENT

Joel Edelman, Director of the Illinois Department of Public Aid, prays that the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on January 18, 1973, be reversed. In support of said prayer, defendants respectfully submit the following Comments and Arguments.

I.

A SUIT SEEKING PAYMENT OF RETROACTIVE BENEFITS FOR A CLASS OF WELFARE RECIPIENTS IS WITHIN THE CLEAR MEANING OF THE ELEVENTH AMENDMENT PROHIBITING THE EXTENSION OF THE JUDICIAL POWER OF THE UNITED STATES TO ANY SUIT IN LAW OR EQUITY COMMENCED OR PROSECUTED AGAINST ONE OF THE UNITED STATES.

The Eleventh Amendment to the United States Constitution reads:

> "The judicial power of the United States shall not be construed to extend to any suit in *law* or *equity* commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Established principles of constitutional law provide that a nonconsenting State is immune from suits in law or equity brought in Federal Court by its own citizens as well as by citizens of another state. *Hans* v. *Louisiana*, 134 U.S. 1 (1890); *Duhne* v. *New Jersey*, 251 U.S. 311 (1920); *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964); and *Employees of the Department of Public Health and*

Welfare, State of Missouri v. *Department of Public Health and Welfare, State of Missouri*, 36 L. Ed. 251 (1973).

It is respectfully submitted that a suit seeking payment of a monetary award, by a class of welfare recipients sounding in equity, whether it be characterized as restitution or damages, is within the clear meaning of the Eleventh Amendment, and hence the judgment of the United States District Court for the Northern District of Illinois, and the opinion and mandate of the Seventh Circuit affirming that judgment were in error and should be reversed.

Both the Seventh Circuit in its opinion and the Respondents in their brief in opposition explicitly argue that this Honorable Court is foreclosed from an independent analysis of the Eleventh Amendment issue. (see brief for Respondents in opposition pages 6-8)

The Seventh Circuit found conclusive precedent in several summary affirmances of the Court. In each of these cases the Eleventh Amendment issue was briefed, but not discussed by the Court.[1] The cases relied upon by the Seventh Circuit and now by the Respondents were *Sterrett* v. *Mother's and Children's Rights Organization*, 409 U.S. 809 (1972), summarily affirming sub nom. *Mother's and Children's Rights Organization*, Civil No. 70 F. 138 (N.D. Ind., April 14, 1972), on remand sub nom. from *Carpenter* v. *Sterrett*, 405 U.S. 971 (1972); *State Depart-*

(1) Presumably, all other portions of the opinion are obiter dictum since such language was not necessary for the ultimate disposition of the case. The obiter dictum, however, will be treated in full as Respondents' Brief in opposition to certiorari essentially followed the outline of the Seventh Circuit opinion.

ment of Health and Rehabilitative Services v. *Zarate*, 407 U.S. 918 (1972), summarily affirming, 347 F. Supp. 1004 (S.D. Fla. 1971); *Wyman* v. *Bowens*, 397 U.S. 49 (1970), affirming per curiam, sub nom., *Gaddis* v. *Wyman*, 304 F. Supp. 717 (S.D. N.Y. 1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), affirming 270 F. Supp. 331 (D. Conn. 1967).

In each of these direct appeals, the Eleventh Amendment argument raised by the Appellants was not discussed in the ultimate disposition of the case by the Court.[2] Accordingly, there has never been any decisive utterance of the Court on the application of the Eleventh Amendment to the suits of welfare recipients seeking retroactive monetary awards.

Your petitioner submits that the treatment of summary affirmances as conclusive precedent without judicial discussion is improper. The Second Circuit Court of Appeals in *Rothstein* v. *Wyman*, 467 F. 2d 226, 241 (1972) properly characterized summary affirmances in the Eleventh Amendment field as mere evidence that "the Supreme Court has not yet come to grips with the problem of

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(2) Each of these cases reached the same result, and on appeal all were affirmed. Of these affirmances, two were summary. See Sterrett v. Mother's and Children's Rights Organization, 409 U.S. 809 (1972) summarily affirming sub nom. Mother's and Children's Rights Organization, Civil No. 70 F. 138 (N.D. Ind. April 14, 1972) on remand sub nom. from *Carpenter* v. *Sterrett*, 405 U.S. 971 (1972); *State Department of Health, Education and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972), summarily affirming, 347 F. Supp. 1004, (S.D. Fla. 1971). One case, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) was affirmed without any discussion of the Eleventh Amendment issue, and another, *Wyman* v. *Bowens*, 397 U.S. 49 (1970) was affirmed per curiam on the authority of *Shapiro*.

retroactive public assistance payments as a remedy which Federal Courts either can or should order to be made."

Indeed, there is compelling logic for the proposition that summary affirmances should not be considered as binding precedent. Often, it is impossible to determine the rationale of a summary affirmance. Further, even if the rationale could be ascertained, it frequently cannot be determined whether a majority of the Court concurred in the rationale or simply the result. There is considerable academic thought that summary affirmances give rise to ambiguity even when controlling authority may be cited by the Court. See *Hart*, "The Time Chart of Justices, Forward to the Supreme Court, 1958 Term," 73 Harv. L. Rev. 84, 98-99 (1959). Under the circumstances, it is respectfully submitted that the rules to be derived from such opinions are too uncertain for application.

Respondents argue that your petitioner failed to raise the Eleventh Amendment on defense in the trial court, and only alleged it for the first time on appeal to the Seventh Circuit. The Seventh Circuit did not find this argument sufficiently sound so as to preclude its own analysis.

It is admitted by your petitioner that it did not raise the Eleventh Amendment defense in the trial court. There were reasons for this omission. There was never any language in the Respondent's complaint from which the Eleventh Amendment defense could necessarily be anticipated. (See Appendix page ——). The Respondents never sought retroactive benefits in their prayers for relief, but sought the issuance of a mandatory injunction. Likewise the Complaint in their companion case of *Rodriguez*

v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970) did not suggest a remedy of restitution, and their request for this relief only appeared at the time of entry of the final order. Hence, the legal defense could not be anticipated. Further, it would have been futile for Illinois to have raised the Eleventh Amendment defense with respect to prospective application of the law. The application of the fiction of *Ex Parte Young*, 256 U.S. 490 (1921) was and is quite clear. Clearly, the Eleventh Amendment does not prohibit Federal Courts from ordering state officials to bring their conduct into conformity with federal law. Therefore, no question was entertained about the District Court's jurisdiction to enter a declaratory judgment or mandatory injunction compelling future conformity of the administration of the Illinois Public Welfare program with Federal Statutes and Federal Regulations.

Furthermore, the Illinois Assistant Attorney General who appeared on behalf of the Illinois Department of Public Aid in the trial court as a matter of law could not waive the Eleventh Amendment defense, *Ford Motor Company* v. *Treasury Department of the State of Indiana*, 323 U.S. 459, 467 (1944).[3] In that case, Mr. Justice

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(3) Under any circumstances, the law is clear in Illinois that an Assistant Attorney General can not waive the body politic's defense of Sovereign Immunity as it may be incorporated into the Eleventh Amendment prohibition. In *Illinois* v. *Sanitary District*, 210 Ill. 171, 173, 71 N.E. 334, 335 (1904), it was said:

> ". . . the Attorney General cannot, as we think, waive the State's immunity from being placed in the position of a defendant. Nor can he commit or bind the state by filing a cross-petition, the result of which is to place the State in the attitude of a de-

Reed in delivering the opinion of the Court stated as follows:

> "The objection to Petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on the Federal judicial power of such compelling force that this Court will consider the issue arrising under this amendment in this case even though urged for the first time in this Court."

What is in controversy are the limitations of the application of the *Ex Parte Young* fiction. The Respondents cannot avoid the jurisdictional bar of the Eleventh Amendment merely because their suit is nominally against a State official rather than the body politic when the relief sought is the affirmative payment of funds from the State's fisc. It is submitted that if a suit seeks to declare a liability which must be met from the General Revenue Fund of the body politic, Federal Courts are

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fendant in the proceeding. *Ex Parte Dunn*, 8 S.C. 207; *Dabney* v. *Bank*, 3 Id. 124; *Adams* v. *Bradley*, 5 Sawyer 217; 26 Am. and English Ency. of Law, (2d Ed.) 486.

The authorities seem agreed that where the constitutional exemption can be waived the authority to do so rests with the Legislature. (Citations omitted) We are not called upon to determine whether the legislature under our Constitution could waive the exemption or authorize a suit or proceeding to be brought against the State, as it has not attempted to do so in the case before us."

Likewise see *Powers* v. *Tealeander*, 129 Ill. App. 2d 10, 262 N.E. 2d 342 (1970).

without jurisdiction to entertain the suit without the express consent of the local body politic.

(A) There Is No Express Language In The Social Security Act Depriving The States Of Their Immunity Under The Eleventh Amendment.

As was recently stated by Mr. Justice Douglas in *Employees* v. *Missouri Public Health Department*, Supra, at 36 L. Ed. 2d 256:

> "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a Federal Court is not competent to render judgment against a non-consenting State. . . ."
>
> " . . . it is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown in vast proportions in its application, desired silently to deprive the state of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal form."

Similarly there is no language in the Social Security Administration Act that either expressly or impliedly shows an intent on the part of Congress to deprive the States of their immunity under the Eleventh Amendment.[4] Despite this the Seventh Circuit relied upon an implied consent theory.

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(4) There is also nothing in the compact between the Illinois Department of Public Aid and the United States Department of Health, Education and Welfare that expressly conditions Illinois' participation in the federally assisted welfare programs on its waiver of immunity under the Eleventh Amendment.

There is a heavy burden of proof imposed upon the Respondents to establish express language in the statute showing that Congress intended the States to waive their Eleventh Amendment immunity as a condition of participation in the federally aided program. *Rothstein* v. *Wyman*, 467 F. 2d 226, (2nd Cir., 1972), cert. den. 41 L.Wk. 3527.

(B) There Is No Language, Express Or Implied, In The Social Security Act Which Grants Welfare Recipients The Right To Retroactive Benefits.

Consistent with the Eleventh Amendment, Congress enacted an apparently exclusive remedy in the form of the cut-off of future federal funds when a State failed to conform with Federal Law 42 U.S.C. 604. There is nothing in this statutory enactment that provides for an express or implied right to payment of retroactive assistance.[5] The

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(5) Your petitioners do not question the right of Federal Courts to fashion an appropriate remedy where these rights are implied in the language of the enabling statutes. Indeed, the absence of remedies in certain statutes has not prevented courts from fashioning a remedy. For example, see *Tunstal* v. *Brotherhood of Locomotive Firemen and Engineermen*, 323 U.S. 210 (1944) (under the Railway Labor Act); *J. I. Case Company* v. *Borak*, 377 U.S. 426 (1964) (granting a private cause of action under Section 14A of the Securities Act of 1934); *Gomez* v. *Florida State Employment Service*, 417 F. 2d 569 (5th Cir., 1970) (granting a remedy under the Wagner-Peyser Act, 29 U.S.C. Sections 49-49K (1970)).

However, there is strong authority for the proposition that Congress never intended the creation of a right to retroactive assistance to welfare recipients. See argument, infra. The thrust of your petitioner's theory is that there

remedy provided, as heretofore indicated, is the cut-off of *future* federal funds,[6] no mention being made of a

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is no implied right to retroactive assistance granted to welfare recipients under the Social Security Administration Act; and, even assuming arguendo that there is such a right, there is no language expressed, or implied, in the Social Security Act that would avoid the bar of the Eleventh Amendment prohibition extending the judicial power of the United States to suits in law or equity prosecuted or commenced against the State. As your petitioner establishes, infra, Illinois, contrary to Respondent's false assertion, still recognizes Sovereign Immunity. In essence, it is the position of your petitioners that if such a right is existent, it would have to be exercised and enforced in the Illinois Court of Claims.

(6) In addressing the question of the existence of a right to retroactive assistance, as opposed to the separate and distinct question of the jurisdiction of the Federal Court to entertain such a suit, this Honorable Court's decision in *Rosado* v. *Wyman*, 397 U.S. 397 (1970) may be instructive and possibly dispositive of this issue. In that case, this Court stated at 421-2:

> " . . . we remand the case to the District Court to fix a date that will afford New York an opportunity to revise its program in accordance with the requirements of Section 402 (a) (23) if the state wishes to do so.
>
> * * *
>
> . . . or, should New York choose not to submit a revamped program by the determined date, issue its order restraining the further use of federal monies pursuant to the present statute."

The United States District Court for the Southern District of New York on remand in *Rosado*, supra, interpreted that decision as precluding the ordering of retroactive assistance (322 F. Supp. 1173, 1195-6):

right of welfare recipients to retroactive payments.

The United States Department of Health, Education and Welfare recently sought legislation that would have granted a right of retroactive assistance to welfare recipients. H.R. 16311, 91st. Cong. 2d. Sess. c169-70 (1970). This legislation was never enacted, which makes it clear that Congress never intended to give, and now has re-

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> "Plaintiffs seek to invoke the equity powers of this Court to grant Plaintiffs and other members of their class the amounts they would have received, over and above what they actually did receive, if the states AFDC payment schedules had been in compliance with Section 402 since July 1, 1969. Under the mandate of the Supreme Court, this Court lacks power to grant such relief.
>
> • • •
>
> Concern over the strong implications for federalism implicit in congressional decisions to encourage State administered AFDC programs undoubtedly motivated the Supreme Court to emphasize that the State was to be given a choice.
>
> Supporting this conclusion is the fact that the Supreme Court afforded the State time to revise its program before the District Court was empowered to consider a restraint in the further use of federal money in the state AFDC program. *Rosado* v. *Wyman*, 397 U.S. 397, 421-422. If a remedy for underpayments had, in a sense, vested, this limitation in the District Court's power would have been inappropriate."

The denial of a substantial retroactive monetary award in *Rosado* was not appealed by the Plaintiffs.

The denial of certiorari in *Rothstein* v. *Wyman*, 41 L.W. 3527, and this Court's opinion in *Rosado* v. *Wy-*

jected legislation giving, welfare recipients a right to retroactive assistance. As pointed out in *Employees*, supra, "It is not easy to infer that Congress in legislating . . . desired silently to deprive the States of an immunity they have long enjoyed (under the Eleventh Amendment)."

No demonstration has been made by the Respondents of any express language in the Social Security Act whereby the Eleventh Amendment immunity is waived by a State's participating in the federally assisted program. In the absence of such a demonstration, it must

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man, supra, gives strong support to the conclusion that there are both constitutional and federal statutory bars to retroactive monetary awards being granted to welfare recipients. Despite the Seventh Circuit's characterization of retroactive awards as equitable restitution, it is respectfully submitted that the characterization is improper. It is an elementary principle of equity jurisprudence that the Court will look to the substance of a particular transaction as opposed to its form. *Young* v. *Higbee*, 324 U.S. 204 (1944); *Bromley* v. *McCaughn*, 280 U.S. 124 (1929). In this respect, the true nature of a retroactive monetary award against the state will not be changed by pinning on it the label of equitable restitution. The respondent seeks *affirmative* relief from the State of Illinois in the form of direct payments from the Illinois General Revenue Fund.

Additionally, "when a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Fleischman Distilling Corporation, et al*, v. *Maier Brewing Company, et al*, 386 U.S. 714, 720 (1967) citing *Phillip* v. *Nock*, 17 Wall 460 (1873); *Tessee* v. *Huntington*, 23 How. 2 (1860) cf. *Day* v. *Woodworth*, 13 How. 363 (1852).

be concluded that the Eleventh Amendment immunity is still existent, and the decision of the Seventh Circuit must be reversed.

Nevertheless, numerous Federal Courts have enforced judgments and decrees granting retroactive benefits presumably on an implied right theory in contravention of the Eleventh Amendment. The enforcement of such an alleged right is improper.

Under the circumstances, it is proper to look to all indicia of legislative intent before such an implied right can be established. *United States* v. *American Trucking Association*, 310 U.S. 534, 542-544 (1939); *United States* v. *Dickerson*, 310 U.S. 554, 562 (1939); and *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 463 (1967). However, there is nothing in the Social Security Act that expressly sanctions the right to retroactive assistance. In the absence of such express statutory language, the implied right would have to be inferred from the legislative intent of Congress. Committee Reports and Statements of committee members or their sponsors of legislation have been held to carry the most weight. *Wright* v. *Brinton Branch Bank*, 300 U.S. 440, 463-464 (1936); *United States* v. *United Mine Workers*, 330 U.S. 258, 278-280 (1946); *Duplex Printing Press Company* v. *Deering*, 254 U.S. 443, 474-475 (1920); *Chicago M. St. P. & P. R.* v. *Acme Fast Freight*, 336 U.S. 465, 472-477 (1948); *Mitchell* v. *Kentucky Finance Company*, 359, U.S. 290, 293, 295 (1959); *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 639-640 (1967).

An examination of the Committee Reports establishes an intent on the part of Congress to provide only for present need. There is no indication that Congress in-

tended to fund payments for past needs when payments were not received by welfare recipients as a result of error and/or omission on the part of State welfare officials, or as a result of the construction given a federal statute by a State welfare official.

For example, the House Ways and Means Committee on H.R. 7260, 74th Cong., 1st Sess., in Report Number 615, on the Social Security Act states as follows at page 3:

> "The need for legislation on the subject of Social Security is apparent at this time. On every hand the lack of such security is evidenced by human suffering, weakened morale, and increased public expenditures.
>
> This situation necessitates two complementary courses of action. We must relieve the *existing* distress and should devise measures to reduce destitution and dependency in the future. (Emphasis added).

Likewise, the Senate Finance Committee Report on H.R. 6635, 76th Cong., 1st Sess. (1939) on the Social Security Amendments Act of 1939, at page 5, made the following report on the intent of Congress:

> "The present bill aims to strengthen and extend the principles and objectives of the Social Security Act. The foundations of a permanent program have been laid and it seems wise to build upon the present structure.
>
> Old-age insurance, unemployment compensation, and public assistance are now accepted as permanent in our fabric of social services. The present will is designed to widen the scope and to improve the adequacy in the administration of these programs without altering their essential features. Benefits will continue to be payable as a matter of right to workers

covered by the insurance program; *aid will continue to be related to need under the assistance programs.*" (Emphasis Added.)

The same Senate Finance Committee reported at pages 30 and 31:

> "The purpose of all three assistance programs is further clarified by inserting the word 'needy' in the definitions of those who receive old-age assistance, aid to the blind, or aid to dependent children. A closely related clarifying amendment is applied to all three assistance titles and provides that the state, in determining need, must consider any other income and resources of individuals claiming assistance."

In 1955, the Democratic members of the Sub-Committee on Social Security of the Committee on Ways and Means, House of Representatives, issued a statement for release concurrently with the issuance of the Report of the Staff to the Chairman of the Sub-Committee on Social Security entitled "Social Security after 18 Years". On page 13 of that statement, the Democratic members voiced the following opinion:

> "We are concerned that there is still being urged in some quarters today inadequate, unsound, and ill-advised systems of non-contributory pensions for the aged. We believe that the old age assistance program should adequately provide for needy persons, but we do not believe that it is desirable or practical that arbitrary flat grants should be paid to all aged persons regardless of their need."

In that same year, 1955, the Staff reported to the Honorable Carl T. Curtis, Chairman of the Sub-Committee on Social Security for the Committee on Ways and Means, House of Representatives, 83rd Cong. 2nd Session, on page 54 under the title "The Purpose of Benefits of Both Types of Programs is to Deal with Need":

"A Ways and Means Report of 1939 defined the purpose of the benefit of public assistance and under title two as follows: 'Old-age insurance is to prevent future old-aged dependency. Old-age assistance is designed to relieve existing need.' "

Throughout the legislative history of the public assistance titles to the Social Security Act, there is language expressive of the intent of Congress to provide assistance so as to meet current needs. The review of the Committee Hearings, Committee Reports, and language of the statute manifests no intent to provide a right to retroactive assistance.

In conformity with this legislative history, your Petitioner adheres to the analysis of the Second Circuit Court of Appeals in *Rothstein* v. *Wyman*, 467 F. 2nd 426, (2nd Cir. 1972), cert. den. 41 L. Wk. 3527. The *Rothstein* opinion advances three basic reasons why retroactive assistance should not be granted. The first relates to the fundamental federal principle of satisfying present ascertain needs of impoverished persons.[7] Recognizing that "federal standards are designed to insure that those needs are equitably met . . ., the Court properly observed that the passage of time makes such payments compensatory rather than remedial since "the coincidence between ascertained and existing need becomes less clear."[8] In our case, more than five years have passed, and indeed the nature of the payment is in the nature of compensatory damages.

Not even the Respondents contend that payments in the form of retroactive assistance bear a reasonable relation-

(7) 467 F. 2d. at 234.

(8) 467 F. 2d. 235.

ship to the current needs of the Respondent class. Some of these payments might even be made to estates of decedents, or to individuals who no longer qualify for welfare assistance.

The second interest noted by the *Rothstein* Court was that of assuring proper use of federal funds. The Second Circuit found that the interest was not personal to welfare recipients since Congress provided the cut-off of federal funds as the appropriate remedy. The cause of action sounds in the government of the United States.

The third and most compelling reason, for implying a right was found to be the deterrence of wilfull State violations of federal laws.[9] None was found in the *Rothstein* context, nor may it be found in the Illinois context.

Under the circumstances, it is respectfully submitted that there is neither express intent on the part of Congress to afford welfare recipients the right of retroactive assistance nor is there sufficient evidence in the

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(9) The Respondents argue that there was a wilfull violation of federal law by Petitioner in light of the then existing orders in *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970. Because the Petitioner adhered to a legal position in this case consistent with its theory on appeal in *Rodriguez* v. *Swank*, 403 U.S. 901 (1971), it does not necessarily follow that he proceeded in bad faith or wilfully violated federal law. Respondents suggest that failure to concede error is tantamount to bad faith or wilfull violation of federal law. It is respectfully submitted that it is improper to allege that the exhaustion of one's appellate remedies implies bad faith.

Such a characterization is contrary to the manifest weight of the record especially in the light of the fact that no testimonial evidence was ever produced by the Plaintiff-Respondent.

legislative history of the Social Security Act to imply such a right. Even if a right to retroactive assistance were implied, public policy would require the remedy not be fashioned except in the most extreme circumstances of bad faith. Moreover, the right cannot be enforced in the Federal Courts as a matter of law due to the jurisdictional bar of the Eleventh Amendment, and welfare recipients should necessarily resort to the appropriate forum.

(C) There Is No Implied Consent To Waiver Of Eleventh Amendment Immunity As A Result Of Illinois' Participation In The Federally Funded Public Assistance Program.

The Respondents urge in their brief in opposition to certiorari that Illinois impliedly consented to waive its Eleventh Amendment immunity as a result of participation in the federally funded public assistance program. According to the Seventh Circuit, if an independent analysis were available to it, the theory advanced in *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964) would necessitate a finding that Illinois had waived its immunity.[10] The Seventh Circuit citing *Parden* at 995 found "that Illinois surely left the sphere that it is exclusively its own" when it began its participation in the Federal-State Welfare Program and thereby waived its immunity. However, the decision of the Seventh Circuit runs counter to this Court's decision in *Employees* v. *Missouri Department of Health and Welfare*, 36 L. Ed. 251, 256. There, Mr. Justice Douglas stated:

> " . . . *Parden* involved the Railroad business which Alabama operated for 'profit'. *Parden* was in the area

(10) 472 F. 2d 992-993.

where private persons and corporations normally run the enterprise.

. . . the dramatic circumstances of the *Parden* case, *which involved the rather isolated state activity can be put to one side.* We deal here with problems that may well implicate elevator operators, janitors, car-women, security guards, secretaries, and the like in every office building in a state's governmental hierarchy." (Emphasis added)

* * *

" . . . (W)e are reluctant to believe the Congress in pursuit of a harmonious federalism desired to treat the States so harshly. The policy of the act so far as the States are concerned is wholly served by allowing the delicate Federal-State relationship to be managed through the Secretary of Labor. It is true that, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. 377 U.S. at 191. *But we declined to extend Parden to cover every exercise by Congress of its Commerce Power, for the purpose of Congress to give force to the supremacy clause by lifting the sovereignty of the States, and putting the States on the same footing as other employees is not clear.*'" (Emphasis added)

No mention was made in the Seventh Circuit opinion about the governmental-proprietary distinction set forth in the *Employees* decision and in *Rothstein*, supra.

It is respectfully submitted that the opinion of the Seventh Circuit begs the question, when, without citations or authority it states that "Illinois surely left the sphere that is exclusively its own" when it began its participation in the federally assisted welfare program.

This departure from *Parden's* logic is fatal. The administration of the Welfare Program is a purely governmental function. It is no different than the administration of the Labor Laws, Mental Health Laws, Insurance Laws, or any other state statutory scheme.[11]

The limitations of *Ex Parte Young* cannot be extended to the recovery of monetary awards against the General Revenue Fund of the people of the State of Illinois. As stated earlier, the parameters of the holding in *Ex Parte Young* are squarely an issue in this case. The conflict between the Second Circuit and the decision below, essentially boils down to the question of how far the limitations of *Ex Parte Young* should be extended. The Second Circuit, in *Rothstein*, took a narrower view of *Ex Parte Young* than the Seventh Circuit, when it stated:

> "It is equally a part of the law of the Eleventh Amendment that, even though a State may not be named as a party defendant, any judgment declaring a liability which must be met from the public

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(11) The Seventh Circuit found that the individual welfare recipient's claim sounded in 42 U.S.C. Section 1983 and that jurisdiction vested in a District Court by way of 28 U.S.C. Section 1343 (3). Despite this finding of fact, it does not bring the facts within those of *Parden* where the statute in question provided a remedy explicitly and none had to be inferred from either the statute or its legislative history. 29 U.S.C. 216 (b). The Seventh Circuit finds nourishment for the implied right to retroactive assistance by way of 45 CFR Section 205.10 (b) (2) (3) that provides for HEW's participation in retroactive payments awarded by courts to welfare recipients. See footnote 15, 472 F. 2d, at 995. However, such a regulation is only the executive branch's interpretation afforded to the congressional enactment.

> funds of the State does come within the reach of the Eleventh Amendment; and the Court will, absent the State's consent be deemed without jurisdiction to enter such judgment." 467 F. 2d. 236.

Your petitioner relied upon the same authorities cited in the Second Circuit opinion. They were *Ford Motor Company* v. *Treasury Department*, 323 U.S. 459 (1944); *Kennicott Copper Corporation* v. *State Commission*, 327 U.S. 573 (1946) and *Great Northern Life Insurance* v. *Reed*, 322 U.S. 47 (1944). All these cases were brought as original actions to collect unconstitutional State statutory assessments. Each was brought in a federal forum. However, the Seventh Circuit chose to restrict the cases to their facts. See 472 F. 2d. 992. The Seventh Circuit suggested that cases such as these should be heard in state courts because of the impact on local finances. For this proposition it cited from Mr. Justice Reed in *Kennicott Copper Corporation* v. *State Tax Commission*, 327 U.S. 573-577 (1948). The quote from Mr. Justice Reed appearing at 472 F. 2d 992 reads:

> "These cases declare that the rule that clear declaration of the State's consent to suit against itself in the Federal Court on fiscal claims is required. The reason underlying the rule, which is discussed at length in the *Read* and *Ford* cases, is the right of a State to reserve for its Courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances. (Citations omitted)."

This rationale, however, militates in favor of the proposition that a suit seeking a monetary award from the fisc of a local body politic is a suit against the State barred by the Eleventh Amendment.

Additionally, the Seventh Circuit's efforts to restrict the foregoing authorities to their facts runs expressly counter to the language of the authorities themselves. For example, in *Ford Motor Company* v. *Department of Treasury, State of Indiana*, 323 U.S. 459, at page 464, (1944) the Court states:

> "(W)hen the action is in essence one for recovery of money from the State, the State is the real, substantive party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants."

This language is also acknowledged in the later case of *Georgia* v. *Redwine*, 342 U.S. 299 (1952). In *Redwine*, the Court, relying on *Ex parte Young*, held that a lower federal court had jurisdiction to enjoin an unconstitutional assessment of state taxes because "a suit to restrain unconstitutional action threatened by an individual who was an officer is not a suit against the state." 342 U.S. 299, 304 (1952). However, the Court drew a necessary distinction between the seeking of affirmative action as opposed to prohibitory action. In speaking about affirmative action, it is apparent that the Court was referring to payments from the fisc of the body politic.

A strong inference can be drawn from *Redwine* that had a request for "affirmative action" been made, the Court would have held that it was, as in *Ford Motor Company* and *Great Northern*, a suit against the State prohibited by the Eleventh Amendment. Hence, despite the language of the opinion below, there is a line of cases which supports the proposition that *Ex Parte Young* does not apply to suits seeking monetary relief against the General Revenue Fund of the body politic.

The Seventh Circuit went one step further; it severely criticized the logic of your petitioner and the *Rothstein* court when it observed that an injunction compelling future conformity has as great an impact upon the fisc of a body politic as a mandatory injunction compelling the payment of retroactive assistance. Prospective relief, it was observed, was as much a liability which must be met from public funds of the State as retroactive relief would be. Petitioner's logic was then questioned by the court as being inconsistent for objecting to one and not the other. Respondents also echo this theory. The Respondent's logic is defective. First, Illinois has the option of either complying or discontinuing its affiliation with the federally assisted welfare program when confronted with a declaratory judgment or mandatory injunction compelling future conformity. These facts are distinguishable from those when a State is enjoined to pay a retroactive monetary award. It must conform with that order whether or not it continues to elect to be affiliated with the federal program. Illinois acknowledges that it would be a difficult political decision to make. Notwithstanding, the legal right to continue or discontinue participation in the federally assisted program is available to the body politic. Hence, action to conform is a voluntary consent in waiver.

But, Respondents urge that the law of Sovereign Immunity has been abolished in the state of Illinois, and the State of Illinois can not raise the defense as a matter of law. Respondents in their brief in opposition cite several federal authorities that hold that it is necessary to look to the law of the local forum in determining whether an action is against the body politic. *Arrowjet General Cor-*

poration v. *Askew*, 452 F. 2d 819, 828-829 [5th Cir. (1971)]; *Brennan* v. *University of Kansas*, 451 F. 2d 1287, [10th Cir. (1971)]. However, they mislead the Court, when their brief states that the Doctrine of Sovereign Immunity is abolished in the State of Illinois. Respondent's brief states at page 6:

> "Moreover, Section 4, Article 13 of the Illinois Constitution abolishes Sovereign Immunity except as provided by law, and it would be anomalous, to say the least, for the Doctrine of Sovereign Immunity embodying the Eleventh Amendment to offer protection to the State of Illinois, where the constitution of the sovereign has abolished the doctrine. Thus, under Illinois law the Eleventh Amendment issue is not properly joined in this case."

This self serving statement is false and misleading.

A careful examination of the history of the Doctrine of Sovereign Immunity establishes its continued existence and viability in the State of Illinois. In this respect, it is necessary to recall that this suit was commenced in January of 1971, and the retroactive monetary award covers the period of July 1, 1968 through the date that the preliminary injunction was entered compelling conformity with the 45 and 60 day rule.

In 1970, the people of the State of Illinois ratified a new Constitution. At the time this suit was filed Illinois was functioning under the Constitution of 1870. On January 1, 1972, Article 13, Section 4, of the Illinois Constitution, the section upon which the Respondents rely, became self operative.

Article IV Section 26 of the Illinois Constitution of 1870 provided:

> "The State of Illinois shall not be made a defendant in any court of law or equity."

Recognizing that persons might have legitimate claims against the State of Illinois which ought to be paid, the Illinois General Assembly passed a Court of Claims Act, Illinois Revised Statutes, Chapter 37, Section 427, et seq. pursuant to the grant of authority contained in the 1870 Constitution. The effect of that act was to provide that persons with certain types of claims against the State of Illinois, which would otherwise be barred by Article IV, Section 26, could be brought in the Court of Claims. Decisions made by the Court of Claims are mere recommendations to the State Legislature, which must take affirmative action to appropriate funds to pay for claims found by the Court of Claims to be just.[12]

Article 13, Section IV, of the Illinois Constitution of 1970 (effective January 1, 1972) altered the old rule of Sovereign Immunity by providing:

> "Except as the General Assembly may provide by law, Sovereign Immunity in this state is abolished."

The General Assembly then acted to restore Sovereign Immunity by enacting Section 801, Chapter 127, Illinois Revised Statutes, 1971. The act became effective on January 1, 1972 (the same date as the 1970 Constitution took effect). The act provides:

> "Except as provided in 'An Act To Create the Court of Claims, . . .' filed July 17, 1945, as amended, the

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[12] The establishment of the Court of Claims by the Legislature under the 1870 Constitution was upheld in the clearest terms in *Edelen* v. *Hogsett*, 44 Ill. 2d 215, 254 N.E. 2d 435. In *Edelen*, the Court dismissed the cause on the basis of the lack of standing of plaintiffs since there was no effort to seek relief in the Court of Claims. Plaintiffs asked the Court to invoke the rule of *Huckaba* v. *Cox*, 14 Ill. 2d 126, 150 N.E. 2d 832 (1958) to declare the Court of Claims Act unconstitutional.

> State of Illinois shall not be made a defendant or party in any court."

Section 801 restored Sovereign Immunity in Illinois but also reaffirmed the rights of persons to bring claims against the State in the Court of Claims. It is respectfully submitted that the welfare recipient's rights, if any, should be enforced in the Illinois Court of Claims.

In applying the Doctrine of Sovereign Immunity to a class of welfare recipients seeking the payment of a monetary award from the Illinois General Revenue Fund, the Illinois Appellate Court has found that it was a bar to the pressing of such claims in Illinois courts of general jurisdiction. In *Chicago Welfare Rights Organization* v. *Weaver*, 5 Ill. App. 3rd 655, 284 N.E. 2d 20 (1972), Presiding Justice Dieringer states:

> "The plaintiffs argue that the immunity of the State from suit does not extend to a State officer where he is enforcing an unconstitutional statute or is proceeding in violation of law. In *Schwing* v. *Miles*, 367 Ill. 436, 11 N.E. 2d 944 (1937), the court said:
>
> > It is settled that a suit against the department is a suit against the State that will not lie. On the other hand, where the action at law or suit in equity is maintained against a State officer or the director of a department on the ground that, while claiming to act for the State he violates or invades the personal property rights of the plaintiff under an unconstitutional act, or under an assumption of authority which he does not have, such suit is not against the State.
>
> But this general rule should now be interpreted to be modified by the rule of *Edelen* v. *Hogsett*, 44 Ill. 2nd 215, 254 N.E. 2d 435 (1969) . . . In *Edelen*, the court made clear that section 26 had been modified by the General Assembly in the Court of Claims Act. Section

439, Chapter 37 of the Illinois Revised Statutes. That act provides for the Court of Claims to have exclusive jurisdiction of certain causes of action. Section (A) is pertinent to this litigation:

> The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> (a) All claims against the State founded upon any law of the State of Illinois or upon any regulation thereunder by an executive or administrative officer or agency, . . ."

The Illinois Appellate Court found as a matter of law in *Chicago Welfare Rights* that the suit was barred by the Doctrine of Sovereign Immunity, and directed the plaintiffs to file their claims in the Illinois Court of Claims. Accordingly Illinois Courts have clearly found that retroactive assistance is barred by the Doctrine of Sovereign Immunity from being aired in Illinois Courts of general jurisdiction.

In reversing the Trial Court the Appellate Court took due and proper notice that the welfare appropriation of the Illinois Department of Public Aid had lapsed. Additionally, it found that the chancellor's order presented severe problems in the orderly administration of the welfare program. Clearly, the Director of the Illinois Department of Public Aid could not request the Auditor of Public Accounts to execute a warrant, or the Treasurer to pay a warrant that issued against a lapsed appropriation. Thus, the Appellate Court found that a current appropriation could not be encumbered by prior years' obligations. This is the purpose of the Court of Claims in Illinois. The Court of Claims provides the procedure for an orderly matching of governmental costs and revenues in the delicate budgetary process of the body politic. Without its function

being performed, Illinois is faced with the exhaustion of current appropriations and tax monies by encumbrances that bear no reasonable relationship in amount or purpose to that legislated by the General Assembly. Public policy and sound fiscal management require that the Illinois General Assembly be given an opportunity to create a separate appropriation for Court of Claims judgments. Using this procedure, the General Assembly and the Executive Branch of Government are able to allocate the limited tax funds of the State.

There is no justifiable rationale for encumbering present year appropriations for the alleged obligation of past years. This practice may lead to the bankruptcy of the State or the exhaustion of available tax revenues. Hence, the Appellate Court acted properly in preserving the orderly budgetary process of Illinois government. Obviously, the State cannot be run like a business. State government must be permitted to match current costs with current anticipated revenue. This process would be destroyed if the courts were to be permitted to place monetary awards against the General Revenue Fund for alleged obligations of past years. It is this very aspect of interference with State budgetary processes which is referred to in *Rothstein,* supra, and *Employees* v. *Missouri Department of Health and Welfare,* in which the delicate balance in federal and State relations, and the doctrine of comity were discussed. Furthermore, there is no way the District Court could have enforced its order except through execution upon the Illinois General Revenue fund; or, if exhausted, compelling the Executive Branch to seek or the Legislature to enact an appropriation from available tax revenues. Hence, the District Court would have been put in the anomalous position of having to order the General Assembly to enact legislation or face contempt—an order which

would be clearly unconstitutional as being a contravention of the Eleventh Amendment to the extent that the Federal Court performed the legislative and executive functions of the body politic. *Louisiana* v. *Jumel,* 107 U.S. 711 (1883); *Hagood* v. *Southern,* 117 U.S. 52 (1886); *North Carolina* v. *Temple,* 134 U.S. 22 (1890); and also see the dicta in *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682 (1949). In each of the aforegoing instances affirmative relief was found to contravene the Eleventh Amendment prohibition.

II.

For purposes of convenience and brevity your petitioners adopt and incorporate herein by reference the following arguments printed in its Petition for Certiorari, and rely and rest upon the authorities and law cited therein. They are: (a) under standards enunciated by the Court for determining the effect to be given a judgment, the facts in the instant case mandate prospective application, and (b) federal regulations relied upon by plaintiff are inconsistent with applicable provisions of the Social Security Act.

CONCLUSION

For the reasons herein urged, it is prayed that the Order and Judgment of the District Court, and the Opinion of the Seventh Circuit affirming that Judgment, be reversed.

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